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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 665.

ALBERT L. WIELAND,
also known as A. L. WIELAND, as Receiver,
Petitioner,

vs.

HARRY E. PAGE,
Respondent.

BRIEF OF RESPONDENT
Opposing Petition for Writ of Certiorari.

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OPINION BELOW.

The opinion of the Supreme Court of Ohio is reported in *Page vs. Wieland, Recr.*, 137 Ohio St. 198, 28 N. E. (2d) 583.

JURISDICTION.

Petitioner seeks to invoke jurisdiction under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925. However, as will be pointed out below, such claim of jurisdiction is not well founded.

STATEMENT OF THE CASE.

The parties will be referred to as they appeared in the trial court. The respondent was plaintiff and the petitioner was defendant. All emphasis in quoted matter appearing in this brief is ours, unless otherwise designated.

The History.

This is an action to recover for severe personal injuries. The action originated in the Court of Common Pleas of Cuyahoga County, Ohio. Trial was had to a jury upon the plaintiff's second amended petition and the defendant's answer. After a trial which took more than a week, the jury brought in a verdict for the plaintiff in the sum of ten thousand dollars and the court rendered judgment for said amount in favor of the plaintiff and against the defendant.

The defendant then appealed on questions of law to the Court of Appeals for Cuyahoga County. By a divided court, with two judges in the majority and one dissenting, the Court of Appeals reversed the Court of Common Pleas and remanded the case for retrial.

The plaintiff then filed a motion in the Supreme Court of Ohio for an order to require the Court of Appeals to certify its record to the Supreme Court of Ohio. The motion was granted and the Supreme Court of Ohio heard the case on its merits. The Supreme Court of Ohio reversed the Court of Appeals and affirmed the judgment of the Court of Common Pleas. The defendant then filed an application for rehearing in the Supreme Court of Ohio, which application was denied without opinion.

The Facts.

Plaintiff, on the evening of March 3, 1935, was invited as a guest for dinner by the occupants of a second-floor suite of premises known as the Huling Hotel. The stairway leading to his hosts' suite was not provided with lights, contrary to the ordinances of the City of Cleveland. As plaintiff was ascending this stairway thus inadequately illuminated, he stepped on an object which later appeared to have been a transparent milk bottle, lost his balance and fell backwards down the stairs, breaking his neck. Whereas prior to these injuries he had been a healthy, active, able-

bodied man, steadily employed in his work as machinist; by reason of the injuries he became permanently, painfully and totally disabled, with the normal function of his spine destroyed, his arms and hands partly paralyzed, and with the prognosis that his condition would steadily grow worse.

At the time, the Huling Hotel was in charge of defendant as receiver. It consisted of a large three-story brick building containing some eighty rooms and was being operated as a lodging house and hotel. The defendant as receiver had failed to comply with the ordinances of the City of Cleveland requiring all public halls, stairways and passageways in buildings of this character to be adequately lighted at all hours and, more specifically, requiring all stairways to be provided with sufficient artificial lights to light the same from sunset to sunrise. The pertinent ordinances are set forth at length on pages 2 to 6 of the second amended petition (R. 2-6).

The Proceedings.

At the trial of the case, the first thing the plaintiff did was to introduce the ordinances as set forth in the pleading, and offer to bring down the City Clerk, whom he had under subpoena, to testify to them. The defendant, in open court, waived the necessity of bringing down the City Clerk as a matter of proof, and admitted that the ordinances as set forth in the pleading were in force. He stated that he was objecting only to the competency, relevancy and materiality of the ordinances. The court then stated that the ordinances might be offered at that time, and that he would rule on the objections after all the evidence was in. So that there may be no mistake about what occurred, plaintiff quotes the record.

"The Court: Call your first witness.

Mr. Kutash: I first wish to *introduce the various sections of the municipal ordinances that are pleaded in the petition.* I have the City Clerk under subpoena

to bring down those original ordinances unless, as I understand Mr. McNeal—

The Court: *Is there any dispute, Mr. McNeal,* first, *as to the accuracy with which the pleading sets forth those ordinances?*

Mr. McNeal: No.

The Court: Then I suppose there still is a question as to the relevancy.

Mr. McNeal: That is true.

The Court: Well, then, for the purpose of our proceeding this afternoon, to facilitate things, *may we consider that these may be offered at this time,* and that counsel will reserve the right to object on the ground of relevancy only, and *we can rule on the question of relevancy after all the evidence is in?*

Mr. McNeal: Well, I would rather reserve the right to object on the ground of incompetency, irrelevancy and immateriality.

The Court: The only thing I am getting at is this: I was wondering whether it would be necessary for any reason to call the City Clerk.

Mr. McNeal: No; no. *I have already told Mr. Kutash he doesn't need to do that, as a matter of proof. I am just objecting to the competency, relevancy and immateriality.* They have told me that they have inspected the records and they found that *they were in force.*

The Court: The record may show at this time you are waiving the right to have the Clerk of the Council come down.

Mr. McNeal: That is true.

The Court: Now, all other questions are reserved until after the evidence is heard.

* * * * *

The Court: Of course, you are reserving your objections to the ordinances?

Mr. McNeal: Oh, yes." (R. 22-23.)

As the trial proceeded it became apparent from the testimony of both sides that the ordinances *were* relevant, competent and material, and applied to this situation. After that, the defendant never questioned the relevancy of the

ordinances. He never offered any testimony, nor indicated that he had any testimony, tending to show the non-applicability of the ordinances. Indeed, he subsequently contended in the Court of Appeals that the ordinances were so relevant they made out a case of negligence *per se* against him. And even in the Supreme Court of Ohio he never questioned the applicability of the ordinance involved (R. 49).

After the plaintiff rested his case, relying on these ordinances, the defendant moved for a directed verdict. The court overruled the motion and directed defendant to proceed with his testimony (R. 23-24). Defendant proceeded to present his case fully. At the conclusion of the entire case defendant made numerous further motions. He moved for a directed verdict after close of all the evidence (R. 24). He moved to strike the first specification of negligence relating to lighting (R. 24). He objected to certain requests to charge before argument which referred to the ordinances (R. 25-27). Although he argued these motions on various grounds, he did *not* claim that he had been denied any opportunity to offer evidence or that he had been denied any constitutional rights. The court overruled defendant's motions and objections and proceeded to charge the jury, giving the jury the substance of the ordinances and their legal effect (R. 29-30). Both at the conclusion of the plaintiff's case and at the end of the entire case, it was obvious that the court considered the ordinances relevant, competent and material since the court overruled defendant's motions which involved the ordinances, and then charged the jury on the ordinances.

After the trial and verdict of the jury, defendant filed a motion for new trial claiming forty-one grounds (R. 11-16), and a motion for judgment notwithstanding the verdict, claiming twelve grounds (R. 16-17). In neither of these motions after trial did defendant claim that the court had failed to rule on his objections or that he had been prevented

thereby from offering any evidence or that he had been denied any rights under the Fourteenth Amendment to the Constitution of the United States.

After the trial court overruled his motions and entered judgment against him, defendant appealed on questions of law to the Court of Appeals. His assignment of errors specified twenty-two claimed errors (R. 36-40). No claim, however, was made that he had been prevented from offering any evidence as to the applicability of the ordinances or that he had been denied any rights under the Fourteenth Amendment.

The first and only time that the federal question was raised was on the application for rehearing in the Supreme Court of Ohio. This application, which included the present claim at the end of a list of some twenty-two alleged grounds, was denied without reasons given, and the alleged federal question never considered or passed on by the Supreme Court of Ohio.

The record filed and relied on by defendant in this Court omits the application for rehearing in the Supreme Court of Ohio. Hence, the record before this Court is utterly devoid of any mention of, or reference to, the Fourteenth Amendment to the Constitution of the United States or the alleged federal question.

SUMMARY OF ARGUMENT.

I. THE ALLEGED FEDERAL QUESTION WAS NOT PROPERLY RAISED IN THE STATE COURTS.

A. The record before this Court fails to show that any federal question was ever raised in the state courts.

B. Even disregarding the defective record, the alleged federal question was raised too late.

C. Defendant's claim that he could not have raised the question earlier is without merit.

D. The authorities cited by defendant do not support his position.

II. THE ALLEGED FEDERAL QUESTION IS WITHOUT SUBSTANCE.

A. The controlling question in this case has already been decided by this Court.

B. The claim that the defendant was misled by the court and prevented from offering testimony is utterly without merit.

ARGUMENT.

I.

THE ALLEGED FEDERAL QUESTION WAS NOT PROPERLY RAISED IN THE STATE COURTS.

A.

The record before this Court fails to show that any federal question was ever raised in the state courts.

The only instance in the entire proceedings in the state courts in which defendant set up or claimed the denial of a right under the federal constitution was his application for rehearing in the highest state court. As pointed out above, the record before this Court does not include such application for rehearing. It is our understanding that such defect is fatal under the rule and decision of this Court requiring that the record must affirmatively show on its face that the question was properly presented to the state courts.

McGarrity v. Delaware River Bridge Commission, 292 U. S. 19, 20:

> "No Federal question was raised prior to a petition for rehearing in the Supreme Court of the State, which was denied without more. Appellant insists questions under the Fourteenth Amendment were thus raised at the first opportunity. *The petition for rehearing does not appear in the record.* * * *
>
> "The appeal is dismissed for the want of a properly presented substantial Federal question."

Robertson and Kirkham on *Jurisdiction of the Supreme Court of the United States,* p. 121, footnote 41.

B.

Even disregarding the defective record, the alleged federal question was raised too late.

The first time the alleged federal question was raised was on application for rehearing to the highest state court, and that court neither entertained the application nor passed on the point. (The statement appearing at the top of page 10 of petitioner's brief that the Supreme Court of Ohio dismissed the application as involving no debatable federal constitutional question is entirely without basis (R. 53).)

It is the settled rule of this Court that federal questions first presented in a petition for rehearing to the highest state court are not timely raised, unless the state court actually entertains the petition and expressly passes upon the federal question.

Godchaux v. Estopinal, 251 U. S. 179, 181:

> "The settled rule is that, in order to give us jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must have been especially set up there at the proper time and in the proper manner; and, further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point."

Rooker v. Fidelity Trust Co., 261 U. S. 114, 117:

> "All that appears is that, after the judgment of affirmance, the plaintiffs sought to raise the question by a petition for rehearing, which was denied without opinion. But that effort came too late."

Herndon v. Georgia, 295 U. S. 441, 443:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Robertson and Kirkham on *Jurisdiction of the Supreme Court of the United States*, p. 119, and the very numerous authorities cited therein.

C.

Defendant's claim that he could not have raised the question earlier is without merit.

Defendant seeks to excuse his failure to raise the alleged federal question in the trial court by the claim that he could not "anticipate that the court would fail to rule on his objections and then charge on the ordinances objected to." (Petitioner's brief, p. 12.) Such claim is patently faulty. If, as he now claims, he was not given a fair trial, then he not only had the right, but he was obliged, to raise the question in the trial court by his statutory motion for a new trial (Section 11576 of the Ohio General Code). Keeping in mind that the motion for a new trial is made *after* trial and verdict, defendant can hardly say that he could not "anticipate" events which obviously had already occurred. Even if we overlook defendant's failure to raise the question during trial, it is clear that he certainly had the opportunity to raise it in his motion for new trial made in the trial court.

This Court has repeatedly held that if the federal question was not raised in the trial court as required by state practice and was not expressly passed on by the appellate court, it will not support a claim of jurisdiction in this Court.

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 308:

"Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in § 709 (U. S. Comp. Stat. 1901, p. 575), and it is thoroughly settled that in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

"The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised. * * *

"The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. * * * It is not properly made when made for the first time in a petition for rehearing after judgment; * * *."

Morrison v. Watson, 154 U. S. 111, 115:

"In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a state, on the ground that it decided against a title, right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity must have been 'specially set up or claimed' at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law and practice of the state, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the state; it cannot be asserted in this court."

Chicago Ind. & L. R. Co. v. McGuire, 196 U. S. 128, 193; *Jacobi v. Alabama,* 187 U. S. 133, 135, 136;

Robertson and Kirkham on *Jurisdiction of the Supreme Court of the United States,* p. 111.

Defendant does not dispute in his brief that under the law of Ohio such question must be raised in the trial court if the appellate courts are to consider it, and therefore no discussion on that point seems necessary. However, the very numerous authorities so holding will be found assembled at 2 *Ohio Jur.* p. 203, *et seq.*

It should also be noted that the defendant not only neglected to raise his alleged federal question in the trial court, but he neglected to raise it in the Court of Appeals where, as the appellant, it was his duty to raise such questions as he wished considered. Indeed even if he had raised the question in the trial court, his failure to preserve it in the appellate court would have constituted a waiver of the question. (Authorities collected in *Robertson and Kirkham* on *Jurisdiction of the Supreme Court of the United States* at p. 115.)

Defendant further seeks to excuse his untimely raising of the question by declaring that he raised the question the first time an *appellate* court ruled against him. Such claim is also rather disingenuous. The requirement of the rule is that the question be raised at the first opportunity —whether that opportunity be afforded in a trial court or in an appellate court. The exception which defendant is inferring neither exists nor has anything in justice or reason to recommend it. In the words of Mr. Justice Brown in *Chicago, Ind. & L. R. Co. v. McGuire, supra*: "This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted."

D.

The authorities cited by defendant do not support his position.

Defendant has cited six cases which deal with the timely raising of the question.

Three of them are of the so-called "surprise" type. While it is true that in these cases the raising of the question for the first time on application for rehearing in the highest court of the state was held timely, the reason for such holding was that the highest state court was the first court to create the situation which was the basis for the complaint. In the *Sanders v. Shaw* case, 244 U. S. 17, the highest state court was the first one to decide the particular question of fact involved and to render judgment for the plaintiff. In the *Missouri v. Gehner* case, 281 U. S. 313, the highest state court was the first court to include in its assessment the particular bonds involved. In the *Brinkerhoff-Faris Trust Company v. Hill* case, 281 U. S. 673, the surprise consisted of the ruling by the highest state court, for the first time, that plaintiff could have pursued a certain other remedy which the same court had previously held was not open to him and the time for pursuing which had expired. None of these cases has any pertinency here. The highest state court in the instant case did nothing more than affirm the judgment in the trial court. It injected no element of "surprise." The situation complained of here is the situation which occurred in the trial court. (Furthermore, as pointed out at pages 7-8 above, if the so-called "surprise" exception is to be relied on, the record must contain the application for rehearing which first raised the question.)

Of the other three cases, two of them: *Whitfield v. Ohio,* 297 U. S. 431, and *Home Ins. Co. v. Dick,* 281 U. S. 397, do not apply because they are expressly based on the fact that the highest state court treated the federal question as properly raised, although it had not been, and expressly

passed on the question—a well established exception to the rule. Such, however, is emphatically not the situation here. The highest state court never recognized the federal question or passed on it in any way.

The remaining case, *City National Bank v. Durr*, 257 U. S. 99, supports, not the defendant's position in this case, but the plaintiff's position. It expressly holds that a federal question first raised on application for rehearing in the highest state court comes too late. Defendant's confusion is apparently caused by the failure to distinguish between the *two* federal questions involved in that case.

II.

THE ALLEGED FEDERAL QUESTION IS WITHOUT SUBSTANCE.

A.

The controlling question in this case has already been decided by this Court.

The crux of defendant's complaint is that the trial court considered and charged on the ordinances without formally admitting them into evidence. The obvious answer to this complaint, as so clearly demonstrated by the Supreme Court of Ohio (R. 43-49), is that the defendant in open court waived proof of the ordinances and admitted that they were in force as pleaded. Such an admission of fact in open court and waiver of its proof may be the ground of the court's procedure equally as if established by the clearest proof; and this Court has so declared.

Oscanyan v. W. R. Arms Co., 103 U. S. 261, 263:

> "The power of the court to act in the disposition of a trial upon facts conceded by counsel, is as plain as its power to act upon the evidence produced * * *.
>
> "In the trial of a cause, the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called * * *.

> Indeed, *any fact bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure, equally as if established by the clearest proof*; * * *.
>
> "But, as already stated, *it cannot make any difference as to the power of the court, whether the facts be developed by the evidence, or be admitted by counsel.*"

The court and plaintiff having relied on defendant's admission and waiver at trial, defendant cannot now retract his admission or seek a deceptive construction thereof.

B.

The claim that the defendant was misled by the court and prevented from offering testimony is utterly without merit.

Defendant claims tha ıe did not know the court held the ordinances to be relevant and that therefore he did not have the chance to offer testimony to show that they were not relevant.

To begin with, the court made it clear that he considered the ordinances relevant, as the testimony then stood, when he overruled defendant's motion for a directed verdict made at the end of plaintiff's case. Plaintiff's case, as defendant admits on page 2 of his petition for certiorari, was predicated on the ordinances. The question whether plaintiff had made out a case necessarily included the question whether the ordinances relied on were relevant and applied to the building involved. A ruling on the greater question necessarily and inevitably constituted a ruling on the included question.

> *Motor Finance Co., Inc. v. Universal Motors, Inc.*, 182 So. (La.) 143;
>
> *Clopton v. Clopton*, 162 Cal. 27, 121 P. 720, 722.

This ruling, it will be observed, was made before the time for defendant to put on his testimony.

In the second place, defendant was not entitled to a ruling *before* he put on his evidence. The court had stated he would rule on the question of relevancy *after all the evidence was in* (R. 23). Not only was this good and sound practice—since the court would then be in a better position to rule—but it met with no objection from the defendant at the time. In so postponing its ruling, the court in effect said to defendant: "If you have any question bearing on the relevancy of the ordinances, let us have it before I rule." Instead of *preventing* the defendant from offering testimony on the matter of the applicability of the ordinances, the court in fact *invited* him to offer any such testimony which he might have. When defendant now says he might have offered testimony after his objections were overruled, he is putting the cart before the horse. The time to offer evidence bearing on a question is *before* the question is ruled on, not *after*.

In the third place, there is nothing to indicate that defendant ever had any testimony to rebut the clear evidence of the plaintiff proving that the building was one which came within the scope of the ordinances. Certainly, defendant never offered or suggested such testimony at the trial or in the trial court. On the contrary, defendant himself and his own witnesses corroborated plaintiff's evidence as to the character of the building and established that the ordinances were indisputably applicable. Even as late as the hearing in the Supreme Court of Ohio defendant made no claim that the ordinance charged on by the trial court did not apply to a building of this character (R. 49). The fact that such claim is being made at this late date seems to indicate a rather desperate casting about for anything to try to support a claim of federal question.

CONCLUSION.

Respondent therefore respectfully submits that since the alleged federal question was not properly raised in the state courts, and since the question itself is without substance or merit, the petition for certiorari filed in this case should be dismissed.

Respectfully submitted,

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Encl